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TRID – A Deep Dive into the Common Mistakes, Liability, Cures, and Proposed Rule

Presented By Richard Horn
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The Design



Closing Disclosure

Closing Information

Date Issued 5/10/2013
Closing Date 5/14/2013

Transaction Information

Borrower

James Wilson
123 Anywhere Ave
Anytown, MD 12345

Seller

John Wilson
123 Somewhere Drive



Richard Horn
Legal PLLC

The Design



5/10/2013

5/14/2013

5/14/2013

James Wilson

123 Anywhere

Anytown, MD 12345

John Wilson

123 Somewhere Drive



The TRID Rule – Past, Present, Future

- Dodd-Frank Act sections 1032(f), 1098, and 1100A directed the CFPB to integrate the mortgage disclosures under TILA and RESPA
 - Two purposes of the integrated disclosures:
 - Aid consumer understanding by utilizing readily understandable language to simplify the technical nature of the disclosures.
 - Facilitate compliance with the disclosure requirements of RESPA and TILA
- Final rule issued on November 20, 2013
 - 1,888 pages
 - 78 FR 79730 (Dec. 31, 2013)
- Amendments
 - 80 Fed. Reg. 8767 (Feb. 19, 2015) - changed rate lock provision
 - 80 Fed. Reg. 43911 (Jul. 24, 2015) - delayed effective date from Aug. 1, 2015 to Oct. 3, 2015
 - 81 Fed. Reg. 7032 (Feb. 10, 2016) – corrected preamble regarding prepaids and 0% category



The TRID Rule – Past, Present, Future

- Closing times increased after effective date and many disclosure violations
 - But in March 2016 (from Ellie Mae Origination Insight Report March 2016):
 - Closing times drop to lowest level since March 2015 - 44 days
 - The closing rate for purchase loans increased to 75.1%, the highest percentage since first tracking data in August 2011
- Industry studies show positive effects of TRID
 - STRATMOR survey shows overall consumer satisfaction has increased under TRID
 - ClosingCorp survey shows consumers have positive experience with TRID forms in understanding closing costs and shopping for service providers
 - TD Bank survey shows overall experience with the TRID forms is very good, and the majority feel the forms are easy to understand
 - ALTA survey shows 92% of consumers reviewed their disclosures before closing, compares to 74% under old rules.
- Issues still remain
 - Lack of CFPB formal guidance
 - Issues with CFPB informal guidance
 - Areas of rule where greater clarity would be beneficial
 - Black hole, construction lending, total of payments, rounding



The TRID Rule – Past, Present, Future

- CFPB announced upcoming Proposed Rule in April 28, 2016 letter to trades
 - “Hope to issue the NPRM in late July”
 - “We also believe that there are places in the regulation text and commentary where adjustments would be useful for greater certainty and clarity.”
- CFPB issued proposed rule on July 29, 2016
 - Addressed many compliance issues
 - Does not address liability or cures

TRID Common Mistakes and Issues

- LE and CD Date Issued are the same
- Title charges missing the “Title –”
- Contact Information Table missing information
- Switching between standard and alternative forms
- Upfront Mortgage Insurance Premium disclosed in wrong section
- Projected Payments table on ARMs does not include requisite number of columns
- Failure to disclose all known fees on the initial LE
- Settlement Agent and File # missing in CD header
- Simultaneous issuance title insurance rates disclosed incorrectly
- Owner’s Title Insurance or other optional insurance products (e.g., home warranty) missing the “optional” designation
- Fee names – changing between the LE and CD
- Black hole
 - Comment 19(e)(4)(ii)-1: “If, however, there are less than four business days between the time the revised version of the disclosures is required to be provided pursuant to § 1026.19(e)(4)(i) and consummation, creditors comply with the requirements of § 1026.19(e)(4) if the revised disclosures are reflected in the disclosures required by § 1026.19(f)(1)(i)”



TRID Common Mistakes and Issues

- Seller's closing costs required on the borrower's CD
- Settlement agents are required to provide the CD to the seller in a purchase transaction 1026.19(f)(4)
 - Must be provided by settlement agent at or before consummation
 - Cannot provide the HUD-1 or ALTA Settlement Statement instead of the CD
 - Must provide a copy of the seller's CD to the lender if borrower and seller information separated
- Settlement agents not updating the CDs
 - Lender's CD, the seller's CD, and the settlement agent's settlement statement should reconcile
- Settlement agents not following lender's closing instructions
 - Using their own CDs instead of lender's
- Indemnification clauses
- Updated CFPB guidance from webinars (*e.g.*, recent April 2016 webinar)
 - Lender/Seller Credits
 - Construction loan guidance



TRID Liability





Administrative Liability

- Agencies can enforce TRID
- CFPB has stated that it and other agencies will provide a “sensitive” period
 - CFPB will be “sensitive to the progress industry has made.” (CFPB letter to MBA, Dec. 29, 2015)
 - For a period of months CFPB efforts will be “diagnostic and corrective, not punitive...” (Director Cordray’s testimony before House Financial Services Committee, September 29, 2015)
 - Examiners will evaluate an institution’s good faith efforts:
 - Implementation plan (actions taken to update policies, procedures and processes)
 - Training of appropriate staff
 - Handling of early technical problems or other implementation challenges (CFPB Press Release, October 2, 2015)
 - Reiterated in April 28, 2016 letter to trades
- Federal banking agencies issued similar statements
 - OCC Bulletin 2015-42, FDIC FIL-43-2015, FRB CA 15-10
 - Will examine CMS and “overall efforts to come into compliance”
 - “Expect [banks/supervised entities] to make good faith efforts to comply with the TRID Rule's requirements in a timely manner



Administrative Liability

- If fail to implement in good faith or substantive violations, potential for administrative damages and penalties remains
- CFPB Enforcement (DFA 1055)
 - Administrative or Judicial
 - Relief
 - Refunds
 - Restitution
 - Damages
 - Limitations on activities
 - Costs in enforcing action
 - Civil Money Penalties
 - Tier 1: Up to \$5,000 per day
 - Tier 2: Reckless violations - up to \$25,000 per day
 - Tier 3: Knowing violations - up to \$1,000,000 per day



Contractual Liability

- Breach of Contract

- Most loan purchase agreements have reps and warranties that the loans comply with applicable law, which includes TRID

- Indemnification

- Agreements may contain indemnification clauses for purchasers of loans for damages resulting from violations of applicable law

- GSEs will not be conducting loan file reviews for technical compliance with TRID for a period of time.

- Expects lenders to make good faith efforts to comply with TRID
 - Do not intend to exercise repurchase remedy for TRID violations except if: (1) the required form is not used; or (2) a particular practice would impair enforcement of the Note or the Mortgage or would result in assignee liability, and a court of law, regulator or other authoritative body has determined that such practice violates the TRID Rule.
 - Fannie Mae Lender Letter LL-2015-06, Freddie Mac October 6, 2015 letter

- FHA

- “Will not include technical TRID compliance as an element of its routine quality control reviews. SFH does expect mortgagees to make good faith efforts to comply with TRID, which, at a minimum requires the use of the TRID required forms.”
 - “FHA also reminds mortgagees of the requirement to comply with all federal, state, and local laws, rules, and requirements applicable to the mortgage transaction as outlined in FHA Handbook 4000.1 II.A.1.ii. (B).”
 - Expired April 16, 2016



Civil Liability

- Uncertain under TRID, because it implements two statutes: RESPA and TILA
- RESPA liability
 - No private right of action for disclosures
- TILA liability
 - Private right of action for disclosures
 - Civil liability applies to requirements imposed under Part B of TILA
 - TILA Part A – 15 USC 1601 to 1616
 - Includes general authority under 1604(a)
 - “The Bureau shall prescribe regulations to carry out the purposes of this subchapter”
 - TILA Part B – 15 USC 1631 to 1651
 - Includes specific disclosure requirements under 1638
 - APR, Finance Charge, Payment Schedule, etc.
- Rule does not set forth which liability applies to particular provisions of the rule or the forms
 - Preamble says to look at the statutory authority used for each provision, that it provides sufficient guidance for industry, consumers and courts regarding liability
 - CFPB recently issued annotated LE and CD with TILA sections under Part B that were “referenced” in preamble
 - May not line up exactly with preamble
- Have to do your own analysis



Civil Liability

- How does this analysis work?
- Is “Liability after Foreclosure” (1026.38(p)(3)) on the Closing Disclosure subject to civil liability?
 - Preamble states :
 - “[T]he Bureau is adopting § 1026.38(p)(3) as proposed, based on the authority stated in the proposal”
 - “Proposed § 1026.38(p)(3) would have implemented the requirements of TILA sections 129C(g)(2) and 129C(g)(3) for all transactions subject to § 1026.19(f)”
 - “[P]ursuant to the Bureau’s authority under TILA section 105(a), Dodd-Frank Act section 1032(a), and, for residential mortgage loans, Dodd-Frank Act section 1405(b), the disclosures required by proposed § 1026.38(p)(3) modified the statutory requirements”
 - TILA sections 129C(g)(2) and 129C(g)(3) are under Part B of TILA (15 USC 1639c)
 - Yes, most likely subject to civil liability
- Is “form purpose” statement (1026.38(a)(2)) in the header of the CD subject to civil liability?
 - Preamble states:
 - “[T]he Bureau declines to revise § 1026.37(a)(2) and is adopting it as proposed, pursuant to the legal authority described above and in the proposal.”
 - “Consistent with TILA section 105(a) and RESPA section 19(a), and ...Dodd-Frank Act section 1032(a).
 - TILA section 105(a) is not under Part B of TILA (15 USC 1604(a))
 - No, most likely not subject to civil liability
- Note that the CFPB annotated LE and CD may differ from the preamble descriptions.

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Civil Liability and Assignee Liability

- If subject to civil liability, what do the damages include?
 - Actual damages
 - Statutory damages (for certain provisions)
 - In an individual action twice the amount of any finance charge up to not less than \$400 or greater than \$4,000 in an individual action; or
 - In a class action, up to the lesser of \$1,000,000 or 1% of the net worth of the creditor;
 - Costs including attorneys fees
- Statutory damages are important because difficult to prove “actual damages” for many violations
- Statutory damages apply only to the following violations “in connection with the disclosures referred to in [1638]”:
 - Amount Financed;
 - Finance Charge;
 - Annual Percentage Rate;
 - Total of Payments;
 - Payment Schedule;
 - Security Interest statement; and
 - The adjustable interest rate and payment examples (pursuant to TILA section 128(b)(2)(C)(ii)).
- But statutory damages may apply to sections of TILA that are not expressly “carved out,” such as 15 USC 1639c
- Investors face assignee liability for violations “apparent on the face of the disclosure”
 - TILA defines this as: “The disclosure can be determined to be incomplete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, *or any other disclosure of disbursement*”



Cures under the Rule

- Tolerance cures under 1026.19(f)(2)(v)
 - Only applies to tolerance violations
 - Must refund the excess to consumer no later than 60 days after consummation
 - CFPB has interpreted this in their illustrative calendar to be a receipt requirement
 - Must provide corrected CD that reflects the refund no later than 60 days after consummation
- Non-numeric clerical errors under 1026.19(f)(2)(iv)
 - Must provide corrected CD no later than 60 days after consummation
 - An error is considered clerical if it does not affect a numerical disclosure and does not affect requirements imposed by § 1026.19(e) or (f)
 - Example of clerical error: incorrect settlement service provider as the recipient of a payment
 - Example of non-clerical error: wrong property address, not clerical because it affects the delivery requirement under § 1026.19(e) or (f)
 - Preamble specifically declined to include numeric clerical errors
- TRID did not change the applicability of the statutory cure provisions



Cures under TILA

- Lenders and investors are now dealing with the issue of how to “cure” violations under TILA, and the potential damages if a court finds a violation
- TILA section 130(b)
 - Notify the borrower of the error within 60 days after discovery of the error, prior to suit or notification by borrower, and “make whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower”
- TILA section 130(c)
 - Provides a defense against liability for unintentional bona fide errors, which do not include errors of legal judgment
 - Statutory provision provides as an example of a covered error, “computer malfunction and programing”
 - Must prove by a preponderance of evidence that: (1) the error was unintentional and clerical in nature, and (2) regularly maintained procedures designed to avoid and prevent the error
 - Historically difficult to prove



CFPB Letter Regarding Liability and Cures

- CFPB sent December 29, 2015 letter to MBA regarding liability under TILA for TRID violations:
 - Statutory damages, “consistent with existing Truth in Lending Act (TILA) principles,” would be assessed based on the final Closing Disclosure and not on the Loan Estimate, “meaning that a corrected closing disclosure could, in many cases, forestall any such private liability”
 - Formatting errors “and the like” are “unlikely to give rise to private liability unless the formatting interferes with the clear and conspicuous disclosure” of one of the disclosures that gives rise to statutory damages
 - The closed set of disclosures that give rise to statutory damages “do not include either the RESPA disclosures or the new Dodd-Frank Act disclosures, including the Total Cash to Close and the Total Interest Percentage”
- But issues with the letter remain:
 - Informal letter
 - Cordray in PHH decision stated that an unpublished HUD letter was “not in such a form as to be binding on any adjudicator”
 - Statement about statutory damages not applying to new Dodd-Frank Act disclosures
 - Liability after Foreclosure, Escrow Account....
 - Uncertainties regarding curing LE errors with CD
 - Benefits of rule for consumers depend on accurate LE



TRID Proposed Rule

- Issued July 29, 2016
- Comments due Oct. 18
- Issues addressed
- Black Hole
- Payoffs and construction costs
 - For construction costs/holdbacks, *as well as other payoffs of existing liens on the property and unsecured debt*, proposal would require them to be disclosed on the standard form under Other Other Costs or on the alternative form under Payoffs and Payments
- Total of Payments
 - Proposed to clarify that the Total of Payments would only include Borrower-paid Loan Costs
 - Would add tolerance that mirrors Finance Charge tolerance but operates independently



TRID Proposed Rule

- Privacy issues
 - GLBA section 502(e)(8), 15 U.S.C. 6802(e)(8), provides an exception for sharing NPI as required by Federal law
 - May have been intended for settlement agents that have refused to provide copies of separate seller's CDs to creditors based on privacy concerns, even though it is required under TRID pursuant to 1206.19(f)(4)
 - CFPB also addressed the exception under GLBA section 502(e)(1), 15 U.S.C. 6802(e)(1), which permits sharing "as necessary to effect, administer, or enforce a transaction requested or authorized by the consumer."
 - CFPB stated is "usual, appropriate, and accepted" for "creditors and settlement agents" to share combined or separate CDs:
 - as a "record of the transaction" to "consumers, sellers, and their agents;" or
 - "information on the status or value of the financial service or financial product to their customers or their customers' agents or brokers."



TRID Proposed Rule

- Calculating Cash to Close - Purchase transactions where Down Payment is negative
 - Would require use of the Funds for Borrower calculation when Down Payment is negative
 - Calculation would subtract the sum of the Loan Amount and any assumed loans, less any Closing Costs Financed, from the total amount of all existing debt being satisfied in the transaction.
 - If positive, disclosed under Down Payment/Funds from Borrower
 - If negative, disclosed under Funds for Borrower.
 - If zero, that is disclosed in both rows.
 - Would also clarify that the “total amount of all existing debt being satisfied by the transaction” if the sum of the amounts that are or will be disclosed, as applicable, under 1026.38(j)(1)(ii), (iii), and (v) (i.e., the Sale Price, sale price of any personal property, and other amounts due from the consumer at closing)
- Assumed loans - would clarify treatment of assumed loans in Down Payment calculation
 - Would be totaled with the Loan Amount and subtracted from Sale Price

Thank You!

Closing Disclosure

Closing Information

Date Issued 5/10/2013
Closing Date 5/14/2013
Disbursement Date 5/14/2013
Agent ABC Settlement
File # 01234
Property 456 Avenue A
Anytown, MD 12345
Sale Price \$240,000

Transaction Information

Borrower James Wilson
123 Anywhere Street
Anytown, MD 12345
Seller John Wilson
123 Somewhere Drive
Anytown, MD 12345
Lender Ficus Bank

Projected Payments

Payment Calculation

Years 1-5

Years 6-8

Years 9-11

Years 12-15

\$789.32

\$1,266 min

\$1,266 min

\$1,266 min

only interest

\$1,582 max

\$1,664 max

\$1,664 max

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